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In The

Supreme Court of the United States

October Term, 1962

No. [redacted] 901

W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner

v.

CLAUDE O. JONES, JR.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
OPINIONS BELOW	1
THE JUDGMENT	2
JURISDICTION	2
QUESTIONS PRESENTED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
ARGUMENT	4
I. The Court Erred in Deciding a Question of Virginia Law Contrary to the Decision of the Supreme Court of Appeals of Virginia	4
II. The Court Erred in Holding That the Burden Was on the Commonwealth to Establish by a Preponderance of the Evidence That the Prisoner Is Legally Detained	9
III. Did the Court Err in Ordering the Discharge of the Prisoner When He Had Other Valid Sentences to Serve?	14
CONCLUSION	15
PROOF OF SERVICE	15

APPENDICES:

Appendix I	App. 1
Appendix II	App. 4
Appendix III	App. 12
Appendix IV	App. 18
Appendix V	App. 30

TABLE OF CITATIONS

Cases

	Page
Albertson v. Millard, 345 U. S. 242	8
Bolling v. Cunningham, 303 F. 2d 639	12
Carlson v. Landon, 112 F. 2d 451 (9th Cir.)	11
Coggins v. O'Brien, 188 F. 2d 130 (1st Cir.)	11
Darr v. Burford, 339 U. S. 200	12
Farrell v. Lanagan, 166 F. 2d 845 (1st Cir.)	11
Goldsby v. Harpole, 249 F. 2d 417 (5th Cir.)	11
Hawk v. Olson, 326 U. S. 271	11, 12
Johnson v. Zerbst, 304 U. S. 458	11
Jones v. Cunningham, 297 F. 2d 851	2
Lyle v. Eidson, 182 F. 2d 344 (8th Cir.)	11
McNally v. Hill, 293 U. S. 131	14
Odell v. Hudspeth, 189 F. 2d 300 (10th Cir.)	11
Pannell v. Cunningham, 302 F. 2d 653 (4th Cir.)	11
Robinson v. Commonwealth, 190 Va. 134, 56 S. E. 2d 367	6
Sampsell v. California, 191 F. 2d 721 (9th Cir.)	11
Schechtman v. Foster, 172 F. 2d 339 (2d Cir.)	11
Snead v. Smyth, 273 F. 2d 838 (4th Cir.)	11
Speiser v. Randall, 357 U. S. 513	8
Stewart v. Smyth, 288 F. 2d 362 (4th Cir.)	11
Thompson v. Overlade, 216 F. 2d 492 (7th Cir.)	11

Page

United States, ex rel. Cooper v. Dinno, 221 F. 2d 626 (3d Cir.) 11

United States v. Burnison, 339 U. S. 87 9

U. S. ex rel. Townsend v. Sain, 276 F. 2d 324 (7th Cir.) 11

Walker v. Johnson, 312 U. S. 275 ..... 11, 13

Statutes and Other Authorities

Code of Virginia:

Section 19-232 ..... 2, 5, 9

Section 19.1-259 ..... 2, 5,

28 U. S. C. 1254(1) 2

In The

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W. K. CUNNINGHAM, JR., SUPERINTENDENT OF THE VIRGINIA STATE PENITENTIARY,

Petitioner

v.

CLAUDE O. JONES, JR.,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PRELIMINARY STATEMENT

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Fourth Circuit entered on January 16, 1963.

OPINIONS BELOW

The initial opinion of the District Court was filed on March 20, 1961, and is not reported (*Jones* v. *Cunningham*, Miscellaneous No. 3241, U. S. Dist. Ct., E. D. Va.). It will be found in Appendix I.

The initial opinion of the court below was filed on Janu-

ary 3, 1962 (*Jones* v. *Cunningham*, 297 F. 2d 851). It will be found in Appendix II.

The opinion of the District Court dismissing the petition after a full hearing, which was filed on June 7, 1962, is not reported (*Jones* v. *Cunningham*, Miscellaneous No. 3241, U. S. Dist. Ct., E. D. Va.). It will be found in Appendix III.

The opinion of the court below of January 16, 1963, is not yet reported (*Jones* v. *Cunningham*, ... F. 2d .....). It will be found in Appendix IV.

THE JUDGMENT

The judgment of the court below was entered on January 16, 1963, and will be found in Appendix V.

JURISDICTION

The jurisdiction of this court to issue the writ of certiorari in the case at bar is grounded upon 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Is a circuit court of appeals vested with the jurisdiction to determine a question of Virginia law in a manner contrary to the decision of the Supreme Court of Appeals of Virginia?

2. Is the burden on the Commonwealth of Virginia in a habeas corpus proceeding to show by a preponderance of the evidence that the prisoner is legally detained?

3. Is a circuit court of appeals vested with the jurisdiction to order the discharge of a prisoner when he has other valid sentences to serve?

STATUTES INVOLVED

Section 19-232, Code of Virginia (1950).

Section 19.1-259, Code of Virginia (1950), as amended.

28 U. S. C. 1254(1).

STATEMENT OF THE CASE

On August 8, 1951, Claude O. Jones, Jr., hereinafter called the prisoner, was arrested by law enforcement officers at his mother's farm in Lunenburg County, Virginia. On that day two warrants were served upon him and, on August 11, 1951, additional warrants were prepared and served upon him.

The prisoner was interrogated by the Virginia State Police and made a full confession (Respondent's Exhibit I). On August 14, 1951, the prisoner, without advice of counsel, waived a preliminary hearing, in the County Court of Lunenburg County.

On August 17, 1951, the Judge of the Circuit Court of Lunenburg County appointed C. F. Blackwell, the senior attorney at the Lunenburg bar, to represent the prisoner. On August 18, 1951, the prisoner, represented by Mr. Blackwell, waived indictment, agreed to be tried on Informations filed by the Commonwealth's Attorney, pled guilty, was found guilty, and the cases were continued in order that a pre-sentence report could be prepared by the probation officer. On August 30, 1951, the report was filed, and the prisoner was sentenced to a total term of thirty-nine years in the Virginia State Penitentiary.

The prisoner has an additional eight years to serve on sentences imposed upon him in other courts.

The prisoner filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia, Richmond Division, in which he alleged that he was denied medical attention by the police officers until he confessed; that he was held incommunicado and not allowed to contact his family, and that he was not effectively represented by his court-appointed attorney.

On March 20, 1961, the petition for a writ of habeas corpus was denied by the United States District Court for

the Eastern District of Virginia, Richmond Division, without a hearing (see Appendix I). On January 3, 1962, the United States Court of Appeals for the Fourth Circuit reversed the District Court, and ordered that a hearing be held (see Appendix II). (*Jones* v. *Cunningham*, 297 F. 2d 851 (Fourth Circuit, 1962)). On January 7, 1962, the United States District Court for the Eastern District of Virginia, Richmond Division, after a full hearing, in an opinion denied the petition (see Appendix III). On January 16, 1963, the United States Court of Appeals for the Fourth Circuit reversed the District Court and ordered that the petitioner be discharged from custody, unless the Superintendent apply to this court for certiorari, or unless the Commonwealth retried the prisoner.

ARGUMENT

Your petitioner will demonstrate on the following pages that the court below has ignored established principles of law in reaching the decision in the case at bar. More ver; it will be shown that the court below has also failed to give proper weight to the testimony of the witnesses, and that the decision in the premises is based upon abstract speculations rather than the realities of the case.

I.

The Court Erred in Deciding a Question of Virginia Law Contrary to the Decisions of the Supreme Court of Appeals of Virginia

The prisoner was charged with breaking and entering an automobile dealer's office with the larceny of certain items found in the automobile dealer's office; with breaking and entering a supermarket, with the larceny of certain items from the supermarket; with the breaking and entering of a movie theater office, and with the possession of burglar's tools.

The provision of Virginia law then in effect which was misconstrued by the court below is Section 19-232 of the Code of Virginia (1950), and reads as follows:

> "§ 19-232. Offense against two or more statutes or ordinances.—If the same act be a violation of two or more statutes, or of two or more municipal ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others. Furthermore, if the same act be a violation of both a State and a federal statute a prosecution or proceeding under the federal statute shall be a bar to a prosecution or proceeding under the State statute. (Code 1919, § 4775; 1920, p. 99; 1948, p. 109.)" (Now § 19.1-259, Code of Va., (1950), as amended)

In construing the statute, the court below observed:

> "As construed by the Supreme Court of Appeals of Virginia, the statute permits the prosecution to charge both breaking and entering with intent to commit larceny and the larceny itself as one continuous act.[6] But while the Commonwealth may file dual accusations, it may not obtain more than one conviction.[7] Here there

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[6] "*Clark* v. *Commonwealth*, 135 Va. 490, 115 S. E. 704 (1923)."

[7] "*Clark* v. *Commonwealth*, *supra*, 115 S. E. at 706, explicitly states that '[w]here the breaking and entering with intent to commit larceny and the commission of the larceny are one continuous act, the accused *can only be convicted of the offense of breaking and entering with intent to commit larceny*. * * *.' (Italics added). Cf *Smyth* v. *Morrison*, 200 Va. 728, 107 S. E. 2d 430, 434-35 (1959). The Commonwealth relies upon *Benton* v. *Commonwealth*, 91 Va. 728, 21 S. E. 495 (1895), for the proposition that an accused may be punished for both larceny and storebreaking if separate counts are inserted in the indictment or information. However, that case was decided prior to enactment of the statute quoted in the text, the manifest purpose of which was to eliminate the hardship inherent in prosecutions under two statutes based upon a single criminal transaction. See *Owens* v. *Commonwealth*, 129 Va. 757, 105 S. E. 531 (1921)."

were not only dual convictions, but cumulative penalties."

In the case at bar the prisoner was charged in separate informations with breaking and entering an automobile dealer's office, with the larceny of certain items from the automobile dealer's office; with breaking and entering a supermarket, and with the larceny of certain items from the supermarket. Of course, the prisoner was charged with other offenses which are not material to this discussion.

The language from the opinion below, which is quoted above, indicates that the court held that under Virginia law an accused may be charged in separate informations or indictments with breaking and entering and grand larceny, but that the accused may be convicted of only one offense. This is not the law in Virginia as adjudicated by the Supreme Court of Appeals of Virginia, the highest court in the Commonwealth. If the prisoner had been charged in a single information with breaking and entering and larceny, he could only have been convicted of one offense. This, however, is not the situation in the case at bar. The following language from *Robinson* v. *Commonwealth*, 190 Va. 134, 138-140, 56 S. E. 2d 367, is a dispositive statement of Virginia law on the subject:

"The indictment in the same count also properly charges the petitioner with grand larceny. However, under the decisions of this court, while two separate and distinct charges, one of housebreaking with intent to commit larceny, and the other of grand larceny, may be made in a single count, an accused may be found guilty of either of the offenses but there can be only one penalty imposed. In *Benton's Case*, 91 Va. 782, at page 788, 21 S. E. 495, we stated the rule to be: 'Housebreaking with the intent to commit larceny, and grand larceny are distinct offenses under the law, and to each

is affixed its own penalty, but they may be and often are one continued act, and may be charged in the same count of an indictment. Upon such count the accused may be found guilty of either of the offenses, but there can be only one penalty imposed. *Commonwealth* v. *Hope*, 22 Pick. (39 Mass.) 1; *Josslyn* v. *Commonwealth*, 6 Mete. (47 Mass.) 236; and Bish. on Cr. Pr. Vol. 2, Sec. 144. If it is desired to punish for both offences in a case of this kind, there must be inserted in the indictment a separate count for the larceny, as was done in *Speer's Case*, 17 Gratt. (58 Va.) 570."

"In *Clark* v. *Commonwealth*, 135 Va. 490, 115 S. E. 704, the indictment contained a single count and charged the defendant with breaking and entering a certain railroad car with intent to commit larceny therein and the larceny from the car of articles of the value of $150. This court again applied the rule that where an accused is charged with breaking and entering with intent to commit larceny and the commission of the larceny, he might be convicted of either offense but not of both. The court further held that it was permissible to charge in one count not only the breaking and entering with intent to commit larceny but also larceny at the same time, as one continuous act, the larceny in such case being the best evidence of the intent with which the breaking was committed.

"In *Walters* v. *Commonwealth*, 159 Va. 903, 165 S. E. 495, the indictment contained only one count. It charged housebreaking and larceny. The verdict was a general finding of guilty. It did not specify whether the accused was found guilty of housebreaking or larceny. We held that under such circumstances, under well-recognized principles, the finding would be considered as one of guilty of housebreaking, the major offense. See *Speer's Case*, 17 Gratt. (58 Va.) 570; *Vaughan's Case*, 17 Gratt. (58 Va.) 576, and *Myers* v. *Commonwealth*, 132 Va. 746, 111 S. E. 463. But see *Benton's Case*, *supra* (91 Va. at pp. 791-792), where it is held that breaking and entering and grand larceny are equal in grade.

> "In *Branch* v. *Commonwealth*, 184 Va. 394, 35 S. E. (2d) 593, the accused was charged with two separate crimes, one of breaking and entering in the night-time with intent to commit larceny, and the other of feloniously stealing, taking and carrying away goods of the value of $1,502. We reiterated the rule that housebreaking with intent to commit larceny, and grand larceny, are distinct offenses under the law, and to each is affixed its own penalty, but they may be and often are one continued act, and may be charged in the same count of an indictment. The accused may be found guilty of either of the offenses, but only one penalty may be imposed. See, also, *Harris* v. *Commonwealth*, 185 Va. 26, 37 S. E. (2d) 868." (190 Va. pp. 138, 139, 140).

In view of the foregoing statement of the law by the Supreme Court of Appeals of Virginia, it is manifest that the court below construed the aforesaid provision of Virginia law in a manner contrary to the views expressed therein. As a demonstration of the invalidity of the petitioner's conclusion in the premises, the court's attention is respectfully directed to the testimony of the Attorney for the Commonwealth for Lunenburg County, wherein he stated that it was customary procedure in his court to charge both offenses (Tr. 131).*

It is a basic constitutional principle that the construction of State laws is the exclusive responsibility of the State courts. (*Speiser* v. *Randall*, 357 U. S. 513.) Interpretation of State legislation is the function of the State courts, and the construction given to a State statute by the State court is binding upon the Federal courts. (*Albertson* v. *Millard*, 345 U. S. 242.) The construction of a State code by the highest court of the State is binding on the Supreme Court

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*All references are to pages of the typewritten transcript.

of the United States. (*United States* v. *Burnison*, 339 U. S. 87.) For the foregoing reasons, it is submitted that the court below erred in interpreting Section 19-232 of the Code of Virginia, in that it construed the aforesaid provisions of Virginia law in a manner contrary to the decisions of the Supreme Court of Appeals of Virginia. This action on the part of the court below is in the teeth of the cited decisions of this court holding that the interpretation of State laws lies in the State courts, and that such an interpretation is binding upon the State courts.

For these reasons it is submitted that the writ of certiorari should issue because of this manifest error on the part of the court below.

II.

The Court Erred in Holding That the Burden Was on the Commonwealth to Establish by a Preponderance of the Evidence That the Prisoner Is Legally Detained.

The decision of the court below was based upon the fact that the Commonwealth had failed to show that the petitioner was legally detained. The rule of law enunciated by the court below in the case at bar is contrary to the decisions of this court; is contrary to the decisions of other circuit courts of appeal and, indeed, is contrary to the previous decisions of the United States Court of Appeals for the Fourth Circuit. A brief review of the evidence will support the Commonwealth's theory in the premises.

In the first instance, the misstatement of the applicable provision of Virginia law forms a portion of the basis for the decision below. It was the established practice in Lunenburg County, Virginia, to charge both breaking and entering and grand larceny in separate Informations or indictments, and this procedure was based upon the cases previously cited in this brief (Tr. 131). It is important to

emphasize that this was a question of evidence, and there is no suggestion in the opinion of the court below that there was insufficient evidence to convict the prisoner of both charges.

A review of the evidence adduced at the habeas corpus hearing reveals that the prisoner was fully advised as to his constitutional rights by the police officers (Tr. 77, 95, 105, 106), and that no promises or threats were made by them (Tr. 72, 79, 95). The prisoner was interrogated briefly on the day of his arrest (Tr. 75, 76, 87), and not on the next day at all (Tr. 75, 85). He was interrogated briefly on the third day after his arrest, and at this time he made the confession (Respondent's Exhibit 1). The prisoner wrote the terminal paragraph of his confession in his own handwriting (Tr. 80). The Judge of the Circuit Court of Lunenburg County explained to the prisoner his constitutional rights (Tr. 126, 127), and the prisoner stated that he desired to be tried at once (Tr. 125).

The prisoner testified that he had lost a great deal of blood at the time he was arrested; that he was suffering from this loss of blood and the delirium tremens at the time he signed the confession (Tr. 7, 20), and that he was so nervous that it was necessary Investigator Tucker to hold his hand in order that he could sign the confession (Tr. 64). He testified that he had been questioned almost around the clock (Tr. 21); that he had been promised leniency (Tr. 46), and that he was not advised of his constitutional rights. The testimony of the attorney who represented the prisoner at the time of his convictions was stipulated, because the attorney was ill in the Veterans Hospital in Richmond. Prior to this time, the attorney had made an affidavit wherein he set forth his recollection of the case. This affidavit, which was made before the attorney became ill, will

be found in the record. It is true that the attorney was not appointed until the day before the trial.

This court has heretofore held that the burden is upon the petitioner in a habeas corpus proceeding to convince the trier of the facts by a preponderance of the evidence that he is illegally detained. (*Hazek* v. *Olson*, 326 U. S. 271; *Walker* v. *Johnston*, 312 U. S. 275; *Johnson* v. *Zerbst*, 304 U. S. 458.) The cited cases hold that if the petitioner does not carry the burden imposed upon him, it is the duty of the court to deny the writ.

The court below has held to the contrary. The following cases from other circuits are also at variance with the decision in the case at bar: *Farrell* v. *Lanagan*, 166 F. 2d 845 (First Cir.); *Coggins* v. *O'Brien*, 188 F. 2d 130 (First Cir.); *Schechtman* v. *Foster*, 172 F. 2d 339 (Second Cir.); *United States, ex rel. Cooper* v. *Dimmo*, 221 F. 2d 626 (Third Cir.); *Goldsby* v. *Harpole*, 249 F. 2d 417 (Fifth Cir.); *U. S. ex rel. Townsend* v. *Sain*, 276 F. 2d 324, (Seventh Cir.); *Thompson* v. *Overlade*, 216 F. 2d 492 (Seventh Cir.); *Lyle* v. *Eidson*, 182 F. 2d 344 (Eighth Cir.); *Sampsell* v. *California*, 191 F. 2d 721 (Ninth Cir.); *Carlson* v. *Landon*, 112 F. 2d 451 (Ninth Cir.); *Odell* v. *Hudspeth*, 189 F. 2d 300 (Tenth Cir.).

The previous decisions of the United States Court of Appeals of the Fourth Circuit on the question of burden of proof are also contrary to the decision in the case at bar. (*Snead* v. *Smyth*, 273 F. 2d 838 (Fourth Cir.); *Stewart* v. *Smyth*, 288 F. 2d 362 (Fourth Cir.); *Pannell* v. *Cunningham*, 302 F. 2d 653 (Fourth Cir.).)

An analysis of the foregoing decisions of the Fourth Circuit and other circuit courts of appeals reveals that these decisions are contrary to the decision in the case at bar. It has been heretofore held by this court and by the Circuit Courts of Appeal, including the Fourth Circuit, that the

burden is on the petitioner in a habeas corpus proceeding to show by a preponderance of the evidence that he is illegally detained.

The cited cases also stand for the proposition that the burden is a heavy one, and that the petitioner must overcome the strong presumption of the constitutional regularity of State judicial proceedings. (*Darr* v. *Burford*, 339 U. S. 200.)

In the case at bar the court below has departed from judicial precedent in reaching the decision in the premises. The court ignored the overwhelming weight of evidence produced on behalf of the Commonwealth at the hearing in the District Court. It is suggested in the opinion that the attorney might have objected to the introduction of the confession in evidence. The court fails to hold that the confession was obtained by illegal means. Indeed, a review of the evidence reveals that the petitioner freely confessed to the charges.

While there are many misstatements of fact contained in the opinion, we will allude to only one more. In the opinion it is stated categorically that the prisoner had not been in touch with his friends or with his family while in the county jail. A review of the evidence reveals that the prisoner was arrested on his mother's land, in the presence of his uncle, and that his uncle was present at the preliminary hearing.

It has been held that the credibility of the witnesses is for the trier of the facts to determine. (*Hawk* v. *Olson*, 326 U. S. 271.) Prior to the decision of the court below in the case at bar, this rule had been followed in the Fourth Circuit. (*Bolling* v. *Cunningham*, 303 F. 2d 639.) In the case at bar the Fourth Circuit has substituted its judgment for the judgment of the District Court as to the credibility of the witnesses, and has chosen to believe all of the testimony given by the petitioner and none of the testimony

given by witnesses on behalf of the Commonwealth. This view of the case by the Fourth Circuit is clearly erroneous under the aforesaid decision of this court.

One final matter deserves comment. The Fourth Circuit ignored the affidavit made by Mr. Blackwell some years ago. The court held that the District Court should not have considered this affidavit and based its decision on this court's holding in *Walker* v. *Johnston*, 312 U. S. 275. In the cited case it was held that it was improper to use ex parte affidavits in a habeas corpus proceeding in order to dismiss the matter without a hearing. The circumstances in the case at bar are different from those in the cited case. Mr. Blackwell has been ill for some years. Since he made the affidavit in connection with this case his has suffered several strokes, and at the time of the hearing in this matter, was confined at the Veterans Hospital in Richmond with some broken bones. It would have been impossible for him to testify in the habeas corpus hearing, and it would have endangered his health to have subjected him to extensive questioning relative to the case. He enjoyed an excellent reputation in his community prior to his illness. He was a well qualified attorney and highly thought of by the court and the members of the bar. Under these circumstances it would seem that it was entirely appropriate for the District Court to consider the affidavit of this attorney who was ill and unable to appear to testify.

For the foregoing reasons, it is submitted that the Fourth Circuit took an erroneous view of the applicable law in considering the evidence in the case at bar. Indeed, it is submitted that the court ignored the overwhelming evidence presented on behalf of the Commonwealth in the case. For these reasons the writ of certiorari should issue to review this question also.

III.

Did the Circuit Court Err in Ordering the Discharge of the Prisoner When He Had Other Valid Sentences To Serve?

The court's attention is respectfully directed to Exhibit I appended to the Answer filed in the District Court on behalf of the Commonwealth in this case. At the time of the hearing the prisoner was detained pursuant to a conviction for storebreaking. He is still detained pursuant to that conviction. Assuming that the prisoner continues to earn "good time," this sentence will expire on June 11, 1963. He then has to serve convictions for grand larceny, breaking and entering a storehouse and the possession of burglar's tools from the Lunenburg County Circuit Court. Of course, the court below has invalidated these convictions. The petitioner was sentenced to serve five years in the Circuit Court of Charlotte County for storebreaking, and three years in the Circuit Court of Louisa for housebreaking. The court below has not invalidated these sentences.

It is submitted that the court erred in declaring void the three remaining sentences which the prisoner had to serve from Lunenburg County, for the reason that the writ of habeas corpus lies only to test the validity of the petitioner's present detention. (*McNally* v. *Hill*, 293 U. S. 131.)

Since the prisoner has eight years of valid sentences to serve, it is submitted that the court erred in ordering that the Superintendent release him from custody. In the absence of any holding by the Circuit Court that the five-year sentence and the three-year sentence are void, it is submitted that the court was without authority to order the prisoner's release.

For these reasons it is submitted that the court erred in the form of relief granted the prisoner.

CONCLUSION

Your petitioner has demonstrated conclusively that the Circuit Court erred in interpreting a provision of Virginia law. It has been shown that the court ignored the overwhelming weight of evidence presented on behalf of the Commonwealth in this case in reaching its decision in the premises. It has been demonstrated that the court erred in ordering the prisoner's release when the prisoner has other valid sentences to serve. The conflict between the decision in this case and the decision of this court and of the other circuit courts of appeal on the question of burden of proof in a habeas corpus proceeding demonstrates beyond all doubt the error committed by the court in making its decision in the premises.

It is for these reasons that your petitioner prays that this court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in the premises.

Respectfully submitted,

ROBERT Y. BUTTON
Attorney General

RENO S. HARP, III
Assistant Attorney General

Supreme Court—State Library Building
Richmond 19, Virginia

PROOF OF SERVICE

I, Reno S. Harp, III, one of the attorneys for the petitioner herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on this the

12th day of March, 1963, I served copies of the foregoing Petition for a Writ of Certiorari on the respondent herein by mailing the same in a duly addressed envelope, with first class postage prepaid, to his attorney of record, John W. Edmonds, III, Attorney at Law, State-Planters Bank Building, Richmond, Virginia.

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Assistant Attorney General

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Claude O. Jones, Jr.

versus

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary

A petition for writ of habeas corpus has been filed by Claude O. Jones, Jr., in forma pauperis. By order of the Court, respondent was directed to file an answer to said petition. An answer, with exhibits attached thereto, has been filed by the respondent.

From the pleadings, and exhibits attached thereto, it appears to the Court that on August 18, 1951, the Circuit Court of Lunenburg County, Virginia, appointed C. F. Blackwell, a practicing attorney at law for over thirty years, to represent petitioner, Claude O. Jones, Jr., in a criminal matter before that Court. After conferring with his attorney and after being advised by the Court of his constitutional rights, petitioner signed, in open court, statements waiving his right to indictment or presentment by a grand jury and consented to go to trial before the Court on six informations filed by the Commonwealth Attorney. Petitioner was then arraigned. Upon the advice of his attorney, petitioner, in person, entered a plea of guilty to each of the six informations. The Court heard evidence and referred the matter to its probation officer who was directed to investigate petitioner's past record and report his findings to the Court on or before August 30, 1951. On

August 30, 1951, petitioner was present in Court with his attorney when the probation officer filed his report; petitioner was advised of the report and his attorney cross-examined the probation officer and argued in favor of lesser sentences than those recommended by the Commonwealth Attorney. Petitioner was asked if he had anything to say, or knew of any reason, why sentence should not be pronounced at that time; nothing was offered in delay and the Court pronounced sentence against petitioner.

It is the opinion of the Court that petitioner was not denied effective representation by counsel so as to make petitioner's trial a farce and mockery of justice in the Circuit Court of Lunenburg County, Virginia. (In re Hodge, 262 F. 2d 778 (9 Cir. 1958); Snead v. Smyth, 273 F. 2d 838 (4 Cir. 1959)).

It is the opinion of the Court that petitioner's allegations fail to show that his conviction in the Circuit Court of Lunenburg County, Virginia, was based on the use of illegally obtained evidence. (Taylor v. U.S. 238 F.2d 409 (9 Cir. 1956); Hanson v. Warden, 198 F. 2d 470 (4 Cir. 1952); Broadus v. Lowry, 245 F. 2d 304 (6 Cir. 1957)).

It appearing that petitioner is presently detained by authority of a sentence imposed on August 30, 1951, by the Circuit Court of Lunenburg County, Virginia, the Court is of the opinion that petitioner is premature in attacking, by petition for writ of habeas corpus, the validity of the sentence imposed by the Circuit Court of Charlotte County, Virginia. (McNally v. Hill, 293 U.S. 131 (1934); Darr v. Burford, 339 U.S. 200 (1950); Heflin v. U.S. 358 U.S. 415 (1959)).

It is, therefore, ORDERED that the prayer of the petition for writ of habeas corpus be and the same is hereby denied, and the said petition be and the same is hereby dismissed.

The Clerk is directed to mail certified copies of this order to the petitioner, the respondent, and the Attorney General of Virginia.

United States District Judge

Richmond, Virginia
March 20, 1961

APPENDIX II

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8385.

Claude O. Jones, Jr., Appellant.

versus

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND.
OREN R. LEWIS, DISTRICT JUDGE.

(Argued October 3, 1961. Decided January 3, 1962.)

Before SOBELOFF, Chief Judge, BOREMAN, Circuit Judge, and MICHIE, District Judge.

John W. Edmonds, III, (Court-assigned Counsel) for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Frederick T. Gray, Attorney General of Virginia, on brief) for Appellee.

SOBELOFF, Chief Judge:

This state prisoner, Claude O. Jones, now in the custody of the Warden of the Virginia Penitentiary under consecutive sentences aggregating thirty-nine years, claims that he was denied the effective assistance of counsel at his trial on informations containing three counts of breaking and entering, two of grand larceny and one of possession of burglary tools. His claim was rejected by the state

courts without a hearing, and certiorari was denied by the Supreme Court "without prejudice to an application for writ of habeas corpus in the appropriate United States District Court." 364 U.S. 853 (1960). Jones then addressed a petition for such a writ to the United States District Court for the Eastern District of Virginia, but this likewise was dismissed without a hearing. No plenary hearing ever having been given the petitioner in any court upon the issue raised, the only question on this appeal is whether sufficient facts are alleged in the petition to require the District Court to afford him an opportunity to prove them. For purposes of this inquiry, his allegations must be taken as true. They are as follows:

> "On August 8, 1951, petitioner was arrested at his parents' home by the authorities of Lunenburg County, Virginia, and subsequently lodged in jail without first having been presented with a warrant of arrest on any valid charge.
>
> "That at the time of the petitioner's arrest he was seriously ill and in an alcoholic daze and was not permitted to contact an attorney at law or his family.
>
> "That he was interrogated constantly, by the authorities in a coercive manner and denied medical attention until a confession was obtained; that some four or five days after petitioner was forced to submission and unwittingly agreed to a statement amounting to guilt.
>
> "That upon being forced into a statement by the authorities, petitioner was still held incommunicado in jail, and not presented before the Court to face any formal charge until the 18th day of August, 1951, ten days after his unlawful arrest, at which time, he learned for the first time what he was charged with.
>
> "That upon appearing in Court petitioner was forced into a plea of guilty, and only after pleading, was he assigned counsel to represent him; that this was

the first contact allowed with an attorney at law since his unlawful incarceration, and that upon his court-appointed counsel stepping into the case, the said counsel remarked to the petitioner: 'Well, you've made a confession there's nothing I can do for you.'

"That thereupon the attorney for the Commonwealth brought forth his informations and told the appointed counsel that petitioner had already agreed to waive indictment and trial by jury and that he had the waivers and informations prepared; that then the court-appointed attorney had the petitioner to sign the waivers.

"That thereafter petitioner was tried within a matter of minutes on the six charges against him, and on the 30th day of August, 1951, petitioner was sentenced to confinement in the penitentiary for an aggregate sentence of thirty-nine (39) years."

Although it may be a complete fabrication, this detailed account raises substantial constitutional issues. It follows, therefore, that the District Court erred in dismissing the petition without a hearing, and its judgment must be reversed.

Of those protections which the state is required under the Constitution to furnish an indigent defendant, perhaps the most salutary is the "guiding hand of counsel." See *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932). While in non-capital cases not every defendant is constitutionally entitled to this protection, the Supreme Court has laid down the rule that where the circumstances are such as to prevent an indigent defendant from adequately conducting his own defense, the state, in the absence of waiver, is obligated to appoint counsel to defend him. See *Rice* v. *Olson*, 324 U.S. 786 (1945); *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948); *Palmer* v. *Ashe*, 342 U.S. 134 (1951). Review of the rele-

vant cases convinces us that the State was obligated to provide the present petitioner with counsel.[1]

The crimes of which Jones stood accused, though not capital, were of a serious nature and carried in combination a maximum penalty of seventy years. He alleges that he was brought into court and required to plead while under the compulsive effect of an illegally obtained confession. Unaided, he was without knowledge of the legal steps he would have to take in his own behalf to exclude this confession, nor could he know at what stage of the trial such steps must be taken lest the point be irretrievably waived. Whether counsel could have successfully attacked the confession, we need not say. It is plain, however, that the procedural and substantive problems of such a challenge and the obvious advantage of interposing it at the trial and preserving the point for review on direct appeal rather than relying on a later collateral attack[2] strongly indicate this petitioner's need for professional guidance.

A second question confronting the petitioner, with which, as a layman, he was not competent to deal, was whether under Virginia law he could properly be convicted of both breaking and entering with intent to commit larceny and the larceny itself. On this issue the Virginia Supreme Court of Appeals has said, "Where the breaking and entering with intent to commit larceny and the com-

[1] In recent cases argued before this court, it has been strongly urged upon us that the course of decisions in the Supreme Court indicates that it is prepared to abandon the distinction made in *Betts* v. *Brady*, 316 U.S. 455 (1942), between capital and non-capital offenses in state trials in measuring the Federal constitutional right to counsel. Reliance is placed on *Chandler* v. *Fretag*, 348 U.S. 3 (1954); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); and *Kinsella* v. *United States*, 361 U.S. 234 (1960). Whatever the merit of this argument, the decision in the present case does not depend upon it.

[2] See *Reck* v. *Pate*, 367 U.S. 433, 448 (1961) (dissent).

mission of the larceny are one continuous act, the accused can only be convicted of the offense of breaking and entering with intent to commit larceny, * * *." *Clark* v. *Commonwealth*, 135 Va. 490, 115 S.E. 704, 706 (1923).[3] It would be unreasonable to expect a layman to be aware of this state decision or to understand how it might help him. These are problems which only a skilled lawyer could handle, and on this issue also the petitioner was sorely in need of professional counsel.[4]

Analogous to the present case are *Rice* v. *Olson*, 324 U.S. 786 (1945), where the legal question was whether an offense committed on an Indian Reservation could be tried in a state court, and the Court held that this was of sufficient intricacy to require the appointment of counsel; and *Hudson* v. *North Carolina*, 363 U.S. 697 (1960), where the Court held that the tactical situation created by a plea of guilty unexpectedly entered by a co-defendant during the course of trial established the need of counsel. Surely, the two legal problems, with which the present petitioner was faced, are as baffling to a layman as the

[3] Compare *Milanovich* v. *United States*, 365 U.S. 551 (1961).

[4] In *Williams* v. *Kaiser*, 323 U.S. 471 (1945) the Court said: "* * * * 'Even the intelligent educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he may have a perfect one.' * * * The decision to plead guilty is a decision to allow judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. * * * He needs the aid of counsel lest he be the victim of overzealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment." 323 U.S. at 475, 476.

jurisdictional question in *Rice* v. *Olson*, or the jury instruction problem in *Hudson* v. *North Carolina*.[5]

We therefore reach the question whether, under the facts alleged, the State complied with its duty to supply counsel or gave it a merely formal recognition. The act of appointing counsel is not enough if in the circumstances the traverser is not afforded in any substantial sense professional advice and assistance.

In *Powell* v. *Alabama*, 287 U.S. 45 (1932), the Supreme Court held that the appointment of "all the members of the bar" and an out-of-state attorney on the day of trial was "far short of meeting in any proper sense, a requirement for the appointment of counsel." 287 U.S. at 56. Later the Court said in *Avery* v. *Alabama*, 308 U.S. 444 (1940), "The denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel." 308 U.S. at 446. See *Reece* v. *Georgia*, 350 U.S. 85 (1955); compare *Glasser* v. *United States*, 315 U.S. 60 (1942).

In the present case, counsel was appointed on the day the defendant was tried. Especially striking is the petitioner's assertion[6] that the court-appointed lawyer, after the most superficial contact with the case and without making inquiry into the circumstances, counselled surrender

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[5] See also, *McNeal* v. *Culver*, 365 U.S. 109 (1961), where the problem of related and included offenses was held to require the appointment of counsel.

[6] We repeat, as indicated earlier in this opinion, that these allegations of the petitioner concerning his legal representation may be utterly baseless. However, in determining the right to a hearing, (and only for this purpose) we are obliged to treat these as true.

because the defendant had given a confession—a confession allegedly made under stress and coercion. No legal representation is worthy of the name if the lawyer makes no investigation of the background of the client's plea entered before the lawyer's appointment, or of the extra-judicial confession which induced the plea. If the exigencies of the trial, already begun, prevented such an investigation, then the appointment of counsel at that stage was an empty gesture and not a true satisfaction of the defendant's constitutional rights. This conclusion is of course reached only in view of all of the alleged circumstances of this case—the seriousness of the offense charged, the coerced confession, the difficult legal questions involved, the failure to appoint counsel until the day of the trial, the alleged lack of investigation or at least lack of serious investigation by the court-appointed counsel and the advice to plead guilty given after such superficial investigation. It does not necessarily follow that the same result would be reached in a case in which only one, or even several, but less than all, of these factors are found to exist.

In addition, although the point was not argued, we note that the District Court, in passing on the allegation that a confession, extracted by coercion, induced the petitioner to plead guilty, appears to have assumed that this cannot be raised on habeas corpus. In this the court erred. The claim may properly be raised on habeas corpus, and if it is proved at the hearing that an illegally obtained confession induced the plea of guilty, the conviction should be set aside unless there has been a voluntary waiver. The Supreme Court has decided that "a conviction following trial or on a plea of guilty based on a confession extorted by violence or by mental coercion is invalid under the Federal Due Process Clause." *Herman* v. *Claudy*, 350 U.S. 116,

118 (1956). Compare *Ciccia v. Lagay*, 357 U.S. 504 (1958).

Lastly, the appellee makes the contention that at all events the District Court was empowered to decide the factual conflict raised by the answer without conducting a hearing. This argument also is without merit. Directly in point is the language of the Supreme Court in *Herman v. Claudy*, 350 U.S. 116, 118-19 (1956): "* * * where a denial of these constitutional protections is alleged in an appropriate proceeding by factual allegations not patently frivolous or false on a consideration of the whole record, the proceeding should not be summarily dismissed merely because a state prosecuting officer files an answer denying some or all of the allegations."

On the issues raised the petitioner is entitled to his day in court.

Reversed and remanded for a hearing

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

Civil Action No. 3241-M

Claude O. Jones, Jr.

versus

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary

MEMORANDUM OPINION

Pursuant to the mandate of the United States Court of Appeals for the Fourth Circuit, the Court appointed experienced counsel to represent the petitioner and awarded him a full hearing on all issues raised in his petition for a writ of habeas corpus.

The petitioner's charges are serious and raise substantial constitutional issues, if true.

From a careful review of the evidence and the exhibits, the Court finds that the petitioner was lawfully arrested at or near his uncle's farm on August 8, 1951; that his uncle, John Bragg, was present when he was arrested; that his foot was badly cut and he appeared to be in a weakened condition at the time of his arrest; that he was immediately taken to a doctor, who dressed his wound and sewed up the cut; that he was thereafter taken to the Lunenburg County Jail.

Two warrants of arrest dated August 8, 1951, were

served on the petitioner that day. Subsequent warrants were issued and served on the petitioner on August 11, 1951.

The petitioner was interrogated by several State Troopers and State Investigators at various times between the date of his arrest and August 10, 1951; that the petitioner was advised of his constitutional rights prior to the interrogation; that the interrogation was conducted in a proper manner; that the petitioner was not interrogated constantly or in a coercive manner; that he was not denied medical attention until the confession was obtained. He was not promised leniency.

The petitioner was not denied the assistance of counsel and was not denied the right to contact members of his family while he was confined and prior to the signing of the confession.

Co-defendant Moore confessed to various crimes and implicated the petitioner. The petitioner was advised that Moore had so done. The petitioner co-operated during the writing of a seventeen-page confession, detailing his activities during the period in question. He signed each page and initialed changes on some pages. He wrote in longhand the last page of the confession. The confession was signed August 10, 1951.

The petitioner and co-defendant were taken before the County Court on August 14, 1951, for a preliminary hearing. They did not have counsel at this time but were again advised by the Judge in open court of their constitutional rights. The petitioner and the co-defendant waived preliminary hearing and the case was sent to the grand jury on that date.

Thereafter, the Commonwealth Attorney advised the petitioner and the co-defendant that the grand jury had

been dismissed for that term and in order for them to be tried prior to the next term of court they would have to be tried on information. The petitioner and the co-defendant indicated that they would like to have a speedy trial and get the matter over with. Thereafter, the Commonwealth Attorney prepared informations and waivers and the Circuit Judge appointed Mr. C. F. Blackwell, the senior member of the Lunenburg bar, to represent the petitioner and the co-defendant. They were brought before the Court on August 18 and in the presence of their counsel the Court advised them of their right to have the matter heard by a grand jury; that the petitioner and co-defendant thereafter signed a waiver in open court; whereupon, the informations were filed and the defendants were lawfully and properly arraigned; that each entered a plea of guilty to each of the charges set forth in the respectiv informations. Whereupon, the Court proceeded to hear the matter, including the reading of a part of the confession.

The petitioner did not at that or any other time advise the Court or any one, including his father, that the confession had been obtained against his will or that he had been mistreated or denied any of his rights while he was confined in the Lunenburg Jail.

Pronouncement of sentence was deferred pending report of the Probation Department. Upon its receipt petitioner was again brought before the Court with his counsel. The Probation Officer was examined in the presence of the petitioner and counsel argued extensively in behalf of the petitioner at the time of his sentence.

Mr. Blackwell, the court-appointed counsel, was unable to testify in this case. He is now confined at McGuire Veterans Hospital and is reported to be in a rather serious condition. Counsel for the petitioner and the State visited

with Mr. Blackwell at McGuire Hospital shortly before the trial and stipulated that he would testify as follows:

That he was appointed counsel on the afternoon prior to the trial; that he first conferred with the prisoners on the morning of the trial; that both parties wanted to plead guilty; that both parties admitted their guilt; that he has no recollection of having seen the confession which the petitioner is supposed to have made. He remembered that it was read in court after the plea of guilty had been entered; that he did not discuss with the petitioner the circumstances under which the confession had been made and that the petitioner had made no complaint as to the circumstances surrounding his confession. Mr. Blackwell stated that he argued the question whether a single act could constitute two separate crimes such as entering and larceny during the pre-sentence hearing. Mr. Blackwell further stated that the total sentence imposed was too heavy; that he told Judge Mitchell so; that he argued that the sentences should be reduced and should run concurrently. Mr. Blackwell felt then and feels now that Jones and Moore should have been treated differently, in that Jones had no previous record.

Mr. Blackwell made an affidavit, which was filed as "Exhibit 3" with the State's answer, wherein he states in more detail the relationship with the petitioner as his court-appointed attorney. This affidavit was made prior to the time Mr. Blackwell was taken to McGuire Hospital.

The burden is upon the petitioner to prove his charges by a preponderance of the evidence. This he has failed to do.

The petitioner called all of the State Troopers and Criminal Investigators who participated in obtaining his confession. An examination of their testimony and that of the petitioner does not satisfy the Court "that he was in-

terrogated constantly by the authorities in a coercive manner and denied medical attention until a confession was obtained."

The Chief of Police, the Deputy Sheriff and the Commonwealth Attorney of Lunenburg County were called by the State. Copies of the warrants of arrest, the original copy of the petitioner's confession and all of the minutes of the trial in the Circuit Court of the County of Lunenburg were made a part of the record. The affidavit of petitioner's court-appointed counsel, which was a part of respondent's answer, and the stipulation in reference to his testimony, were considered by the Court.

The petitioner's father was in the Court room during this hearing. He was not called as a witness.

Upon consideration of which the Court is of the opinion, and so finds, that the petitioner was not denied any of his constitutional rights, in re his arrest, confinement in Lunenburg County Jail, or during his trial before the Circuit Court of Lunenburg County, Virginia.

Petitioner charges that he was not allowed contact with an attorney from the date of his incarceration until after he was forced into a plea of guilty. This charge is not sustained by the evidence.

The petitioner was not denied the right to employ counsel of his own choosing. It is true he did not have counsel after his arrest and during the time he was confined prior to trial. He did not have counsel at the time of the signing of the confession or during the preliminary hearing which was waived. This Court knows of no decision, nor has one been cited, that required the State to appoint counsel prior to arraignment.

Court-appointed counsel was furnished the afternoon prior to date of trial. Mr. Blackwell was the senior member

of the Lunenburg bar and one of its most respected members.

Although he was unable to testify in person, the record is clear that Mr. Blackwell, prior to arraignment and trial, conferred with the Commonwealth Attorney and the prisoners; that he advised the petitioner of his right to a continuance and a trial by jury; that petitioner admitted his guilt and told his counsel he wanted to plead guilty; that petitioner made no complaint about the obtaining of his confession or treatment while confined; that counsel was present when the petitioner was arraigned and plead guilty in open court; that he was present on the date of sentencing and that he cross-examined the Probation Officer and argued that the petitioner's sentence should be less than that of the co-defendant due to his prior good record and that the sentences on all charges should run concurrently instead of consecutively.

The petitioner told the court-appointed attorney that he was guilty. He does not now deny it. This Court can not say that an attorney can or should do more for a client, who admits his guilt, than Mr. Blackwell did for the petitioner in this case.

Therefore, the petition for a writ of habeas corpus will be denied.

/s/ OREN R. LEWIS
United States District Judge

Alexandria, Virginia.
June 7, 1962

APPENDIX IV

CORRECTED COPY

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8716.

Claude O. Jones, Jr., Appellant,

versus

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND. OREN R. LEWIS, DISTRICT JUDGE.

(Argued September 27, 1962. Decided January 16, 1963.)

Before SOBELOFF, Chief Judge, and HAYNSWORTH and J. SPENCER BELL, Circuit Judges.

John W. Edmonds, III, (Court-assigned counsel) for Appellant, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellee.

SOBELOFF, Chief Judge:

Presently confined in the Virginia Penitentiary on sentences aggregating 39 years imposed in 1951, Claude O. Jones, Jr., seeks relief by way of habeas corpus on the

ground that the performance of his court-appointed lawyer was so inadequate as to amount to a denial of the effective assistance of counsel. Pursuant to our holding in an earlier appeal, *Jones* v. *Cunningham*, 297 F.2d 851 (4th Cir. 1962), that this prisoner's petition raised a substantial constitutional question, a hearing was conducted by the District Court, but the District Judge again dismissed the petition. However, the court granted a certificate of probable cause for the present appeal "being of the opinion that a substantial question with regard to the duty which court-appointed counsel owes to his client" was raised. Our consideration is limited to this single issue.

There is no denial, and indeed there can be none, that Jones was entitled to legal representation at his trial. As we indicated in the first appeal, 297 F.2d at 854, the charges against him involved complicated legal issues with which no unskilled layman could be expected to cope, and in combination carried a maximum penalty of seventy years' imprisonment.[1]

As the District Court's findings reveal, the need for counsel was given formal recognition on the afternoon of August 17, 1951, when the Circuit Court for Lunenburg County, Virginia, designated an experienced and highly regarded member of the local bar to represent Jones and his co-defendant William Ray Moore. But this appointment was made on the eve of the trial. Jones had been in custody since his arrest on August 8. A full confession was in the hands of the police, who had interrogated him

[1] Since our earlier decision in this case we have twice decided in line with *Chewning* v. *Cunningham*, 368 U.S. 443 (1962), and other authorities there cited, that trials on serious and legally complex charges were fundamentally unfair because the state failed to assure the accused the effective assistance of counsel. *Hobbs* v. *Peyersack*, 301 F.2d 875, 877-79 (4th Cir. 1962); *Turner* v. *State of Maryland*, 303 F.2d 507, 511 (4th Cir. 1962). See also *Holly* v. *Smyth*, 280 F.2d 536, 539-41 (4th Cir. 1960).

at various intervals during a three-day period. Unassisted and unadvised by counsel, Jones had waived preliminary hearing and indicated to the Commonwealth attorney, the only attorney with whom he had talked, his willingness to relinquish his right to indictment and to plead guilty to all six informations filed against him. *Cf. Hamilton v. Alabama*, 368 U.S. 52 (1961).

Admittedly counsel did not contact the prisoners until the morning of August 18, just before their arraignment and trial. For Jones, who had not been in touch with friend or family while in the county jail, this meeting was his first and only opportunity to obtain professional advice. The court-appointed lawyer allegedly began the interview with the remark, "Well, you have made a confession; there is nothing I can do for you." The attorney now avers his inability to admit or deny making this or other remarks attributed to him,[2] but Jones was emphatic on the point at the hearing: "Mr. . . stopped us just as the jailor was taking us to court and he [the lawyer] said that the court had notified him to be in court that morning, that he was going to be appointed to represent us in court, and also said: 'I don't know why they want to appoint me for. Nothing I can do. You already confessed and pled guilty.' He looked like he was mad."[3] This, according to Jones' uncontradicted testimony, was the extent of the pre-trial conversation with the lawyer.

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[2] The lawyer was seriously ill when the case came on for hearing, and his testimony was stipulated.

[3] Jones adhered to this position both on cross-examination and in response to close questioning by the District Judge, as follows:

"THE COURT: Do you remember Mr. coming in to see you?

"THE WITNESS (Jones): Yes I do.

"THE COURT: Did he come to see you at the jail or the courthouse or where did he see you the first time?

The District Court in its findings makes no reference to the above incident, and there is no finding, and no shred of testimony on which it could have based a finding, that the lawyer made additional inquiry or did anything more for his client then pleading him guilty that same morning. Asked whether he discussed with Jones the question of waiver of indictment and trial by jury, the lawyer replied that he had "no recollection of whether or not any such discussion took place." Nor did the record warrant the conclusion that Jones was advised of his right to seek a continuance.[4] Certainly no application for

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[4] The District Court's finding that the lawyer gave such advice is based solely upon an *ex parte* affidavit filed more than two years earlier, with the return of the Commonwealth. Except for Jones' express denial that any mention was made of a continuance, there is nothing in the record, including the lawyer's stipulated testimony, to support this finding. Such evidence was inadmissible under the established rule that issues of fact presented in habeas corpus proceedings may not be established by *ex parte* affidavits. *Walker* v. *Johnston*, 312 U.S. 275, 285 (1941); *Moses* v. *Hudspeth*, 129 F.2d 279, 280 (10th Cir. 1942); *United States ex rel. Rooney* v. *Ragen*, 158 F.2d 346, 351 (7th Cir. 1946); *United States ex rel. McLeod* v. *Garfinkel*, 202 F.2d 392, 394 (3d Cir. 1953); *United States ex rel. House* v. *Swope*, 232 F.2d 853, 854 (5th Cir. 1956); *United States* v. *Salerno*, 290 F.2d 105, 106 (2d Cir. 1961). Doubtless, reliance on the affidavit as evidence was inadvertent.

"THE WITNESS: The first time when he came to see us was just before we went to court that morning. The jailers came to get ready to carry us up to court.

"THE COURT: At the jail?

"THE WITNESS: Yes sir, at the jail.

"THE COURT: How long did he talk to you at the jail?

"THE COURT: Just passed a few words, a few words.

"THE COURT: What did he say, the best of your recollection?

* * *

"THE WITNESS: Told me the court had notified him to be in court that morning, that he was going to represent us and he said: 'But you already confessed. There ain't a thing I can do for you. I don't know why they wanted to appoint me for.'"

a continuance was made. What does appear is that Jones admitted his guilt to his lawyer and no more was said about the case. For example, the attorney himself acknowledged in the stipulation that he "did not discuss with the prisoner the circumstances under which the confession had been made," and he asserted that Jones made no complaint as to the circumstances surrounding his confession. The District Court so found.

The record also discloses that the trial proceeded without a word being uttered by defense counsel, apart from his insistence that Jones sign the waivers of indictment and trial by jury, as well as formal entry of pleas of guilty to all six informations.

For his part in three storebreakings, Jones was charged and convicted of (a) larceny from, and (b) breaking and entering an automobile dealer's office; (c) larceny from, and (d) breaking and entering a supermarket; and (e) possession of burglar's tools and (f) breaking and entering a movie theater office. The applicable code provision states that "if the same act be a violation of two or more statutes * * * conviction under one of those statutes * * * shall be a bar to a prosecution or proceeding under the other or others."[5] As construed by the Supreme Court of Appeals of Virginia, the statute permits the prosecution to charge both breaking and entering with intent to commit larceny and the larceny itself as one continuous act.[6] But while the Commonwealth may file dual accusations, it may not obtain more than one conviction.[7] Here

[5] Code of Virginia, § 19.1-259 (1950, as amended) (1960).

[6] *Clark* v. *Commonwealth*, 135 Va. 490, 115 S.E. 704 (1923).

[7] *Clark* v. *Commonwealth*, *supra*, 115 S.E. at 706, explicitly states that "[w]here the breaking and entering with intent to commit larceny and the commission of the larceny are one continuous act, the accused *can only be convicted of the offense of breaking and entering*

there were not only dual convictions, but cumulative penalties.

In this instance, the informations were not prepared or filed until the morning of the trial. Had counsel been accorded an opportunity to study them in advance, serious doubt might have entered his mind whether Jones, even if chargeable with all six offenses, could lawfully be convicted of more than one crime for each of the three separate transactions. But this was a matter of defense to be raised in a formal plea in writing, setting forth all the facts and circumstances,[8] and a failure to take such action before trial constituted waiver.[9]

It is true that the lawyer says he did argue the point after trial at a pre-sentence hearing in an unsuccessful attempt to obtain leniency.[10] But this argument came

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[8] A mere motion to dismiss the informations would not suffice. *Sigmon* v. *Commonwealth*, 200 Va. 258, 105 S.E.2d 171, 176 (1958).

[9] *Owens* v. *Commonwealth*, 147 Va. 624, 136 S.E. 765, 767-68 (1927).

[10] He also cross-examined the probation officer at the sentencing hearing and, prior thereto, tried to persuade the Commonwealth attorney to recommend light punishment. But despite Jones' "prior good record," he was given the same sentence as his recidivist co-defendant, an escaped felon. Each received sentences ranging from six to nine years on each separate count, to run consecutively—a total of 39 years. The severity of punishment is of itself significant, since "it gives color to the charge that he has not had the fair trial which the Constitution contemplates." *Mitchell* v. *Youell*, 130 F.2d 880, 882 (4th Cir. 1942).

*with intent to commit larceny * * *.*" (Italics added). *Cf. Smyth* v. *Morrison*, 200 Va. 728, 107 S.E.2d 430, 434-35 (1959). The Commonwealth relies upon *Benton* v. *Commonwealth*, 91 Va. 728, 21 S.E. 495 (1895), for the proposition that an accused may be punished for both larceny and storebreaking if separate counts are inserted in the indictment or information. However, that case was decided prior to enactment of the statute quoted in the text, the manifest purpose of which was to eliminate the hardship inherent in prosecutions under two statutes based upon a single criminal transaction. See *Owens* v. *Commonwealth*, 129 Va. 757, 105 S.E. 531 (1921).

two weeks after Jones had been saddled with dual convictions for each continuous act and went only to the severity of punishment, not the legality of the convictions. Counsel's belated attempt to salvage something from the derelict case forcefully suggests that his initial contact with his client was so fleeting that he could not appreciate until after the trial the serious legal problems lurking in the case.

Likewise, no objection was raised at the trial to the introduction of the extrajudicial confession, which Jones claims was extracted after he had been "interrogated constantly by the authorities in a coercive manner and denied medical attention." Voluntariness *vel non* of the confession is not here the primary question, but it might have been at his trial had the issue been raised. The pertinent inquiry now is the adequacy of legal counsel provided Jones at his trial. If there was a reasonable basis for challenging the confession and it was not challenged because of the late appointment of the lawyer, the failure to make proper investigation, whether for lack of opportunity or otherwise, bears directly on the character of the representation afforded.

Had the attorney taken enough time he could with reasonable diligence have learned from the police as well as from Jones that the latter "appeared to be in a weakened condition at the time of his arrest"[11] and remained in such state at least during the first day of questioning.[12]

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[11] This is the finding of the District Court and it is supported by the testimony of several police officers, one of whom, Chief of Police Eanes, recalled: "He seemed to be suffering from a loss of blood. He looked right pale and from the amount of blood we found in the car, I could see why."

[12] It is undisputed that interrogation began the morning of the arrest. Yet a state police inspector, Tucker, testified from personal

In addition, it was a matter of record that three days intervened between his arrest and confession, a suspicious factor which demanded further probing by the lawyer.[13] Since the police apparently neglected their statutory duty to bring Jones promptly before a judical officer for a preliminary hearing,[14] it was at least arguable that it was "not permissible to trifle with him, and detain and interrogate him, for the ulterior purpose of extracting a confession as to his own guilt, or getting information from him as to the guilt of others."[15] If the attorney needed more time he could have gained time by advising the client not to waive indictment.

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[13] "Confessions obtained by 'secret inquisitorial processes' are suspect, since such procedures are conducive to the use of physical and psychological pressures." *Gallegos* v. *Colorado*, 370 U.S. 49, 50-51 (1962). See *Ashcraft* v. *Tennessee*, 322 U.S. 143, 152, 154 (1945); *Watts* v. *Indiana*, 338 U.S. 49, 54-55 (1949); *Haley* v. *Ohio*, 332 U.S. 596, 599, 600 (1948); *Leyra* v. *Denno*, 347 U.S. 556, 561 (1959); *Fikes* v. *Alabama*, 352 U.S. 191, 197 (1957); *Spano* v. *New York*, 360 U.S. 315, 320-21 (1959); *Reck* v. *Pate*; *supra*; *Culombe* v. *Connecticut*, 367 U.S. 568, 570-603, 622-31 (1961).

[14] Code of Virginia, 1950 § 52-21. In *Winston* v. *Commonwealth*, 188 Va. 386, 49 S.E.2d 611, 615 (1948), it was said with reference to a five-hour jailing prior to hearing before a magistrate "that such detention was illegal is too plain for argument"; conviction reversed.

[15] *Sands & Co.* v. *Norvell*, 126 Va. 384, 101 S.E. 569, 574 (1919); *Winston* v. *Commonwealth*, 188 Va. 386, 49 S.E.2d 611, 614-15 (1948). Compare *McHone* v. *Commonwealth*, 190 Va. 435, 57 S.E.2d 109, 112-13 (1950). But see *Campbell* v. *Commonwealth*, 194 Va. 825, 75 S.E.2d 468, 472-73 (1953).

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recollection as well as notes of his investigation that Jones remained "weak from loss of blood" and "was not in any condition to be questioned." This corroborated Jones' testimony that: "They first come and told me 'Get up out of the bunk there' and wanted to talk to me. I told them I was sick. They said 'Get up. I want to talk to you.' They started questioning me then about all those crimes that happened." The ill-health of a defendant during questioning by the police preceding a confession has been regarded as a substantial factor pointing to the involuntariness of the confession. *Reck* v. *Pate*, 367 U.S. 433, 441-43 (1961).

It is true that Jones did not complain spontaneously to his lawyer during their hurried meeting of his treatment by the police. But this was his first serious encounter with the police and his silence stemmed in all likelihood from the erroneous supposition that his extrajudicial statements, however obtained, concluded the issue of guilt and left him no alternative but to throw himself on the court's mercy. In any event, since the burden of proving voluntariness was on the Commonwealth,[16] the least that was demanded of counsel was some investigation of the pertinent facts and arguable points of law before counselling surrender.

The factual links in this chain of events, verified by the findings, unmistakably confirm the initial hypothesis, concerning which we said in Jones' first appeal, 297 F.2d at 855, that the ill-timed appointment of counsel was merely "an empty gesture and not a true satisfaction of the defendant's constitutional rights." It was no more than a gesture to equip Jones for his day in court with a lawyer of excellent reputation who sought no more than the fleeting opportunity to consult with the accused and made no effort to map out possible defenses. It was not a true satisfaction of the defendant's constitutional rights "to force him to trial with such expedition as to deprive him of the effective aid and assistance of counsel."[17]

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[16] *Early* v. *Commonwealth*, 86 Va. 921, 11 S.E. 795, 797 (1890); *Omohundro* v. *Commonwealth*, 138 Va. 854, 121 S.E. 908, 910 (1924); *Jackson* v. *Commonwealth*, 193 Va. 664, 70 S.E.2d 322, 328 (1952); *Campbell* v. *Commonwealth*, 194 Va. 825, 75 S.E.2d 468, 471 (1953).

[17] *White* v. *Ragen*, 324 U.S. 760, 764 (1945); *Powell* v. *Alabama*, 287 U.S. 45, 58-59 (1932); *Avery* v. *Alabama*, 308 U.S. 444, 446 (1940); *Ex parte Hawk*, 321 U.S. 114, 115 (1944); *House* v. *Mayo*, 324 U.S. 42, 45-46 (1945); *Reese* v. *Georgia*, 350 U.S. 85, 88-89 (1950); *Moore* v. *Michigan*, 355 U.S. 155, 160 (1957); See also

We cannot acquiesce in the suggestion that because Jones told his court-appointed attorney that he was guilty there was nothing else for the lawyer to do but to plead him guilty and hope for a light sentence. As we have just indicated, avenues of defense remained open, and the manifest failure to seek them out is chargeable to counsel or the lateness of the appointment, or both, not to Jones. It cannot be presumed that a defendant, whose need of professional assistance is so great as to require appointment of counsel, is nevertheless capable of comprehending with complete clarity his fundamental rights or possible defenses to complicated charges. Such presumption is refuted by the Supreme Court's statement that the very "purpose of the constitutional guarantee of a right to counsel is to protect an accused from conviction resulting *from his own ignorance of his legal and constitutional rights.* * * *." *Johnson* v. *Zerbst*, 304 U.S. 458, 465 (1938) (italics added).[18] That purpose should not be denigrated by casual distinctions—either by design or inadvertence.

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[18] "Determining whether an accused is guilty or innocent of the charges in a complex legal indictment is seldom an easy task for a layman, even though acutely intelligent." *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948). "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevent to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one." *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); *Johnson* v. *Zerbst*, 304 U.S. 458, 463 (1938); *Williams* v. *Kaiser*, 323 U.S. 471, 479 (1944); *Chandler* v. *Fretag*, 348 U.S. 3, 9-10 (1954).

Turner v. *State of Maryland*, 303 F.2d 507, 511 (4th Cir. 1962), and authorities cited therein. Virginia recognizes these principles. *Morris* v. *Smyth*, 202 Va. 832, 120 S.E.2d 465, 466 (1961); *Cf. Fitzgerald* v. *Smyth*, 194 Va. 681, 74 S.E.2d 810, 816 (1953).

—as to the nature of the intended plea, for the maxim, "the defendant needs counsel and counsel needs time." *Hawk* v. *Olson*, 326 U.S. 271, 278 (1945), holds true irrespective of the fact that the accused ultimately pleads guilty.[19]

Of course, it is not for a lawyer to fabricate defenses, but he does have an affirmative obligation to make suitable inquiry to determine whether valid ones exist. Such a duty is imposed for the salutary reason that "prior to trial an accused is entitled to rely upon his counsel to make an independent examination of the facts, circumstances, pleadings and laws involved and then to offer his informed opinion as to what plea should be entered." *Von Moltke* v. *Gillies*, 332 U.S. 708, 721 (1948).

In view of the undisputed showing that Jones' counsel did nothing of the sort; the inadequacy of representation goes beyond "mere mistakes or errors of counsel." Compare *Snead* v. *Smyth*, 273 F.2d 838, 842 (4th Cir. 1959). Even faulty representation unlike a real absence of representation, presupposes at least some advance preparation. Here the case was not shipwrecked by bad seamanship; it was never launched. The failure of the attorney to preserve the defendant's right to appeal from the illegal sentence cannot be squared with a proper performance of his professional duty.

Even if the failure to inquire into the circumstances of the confession were not sufficient to warrant relief, this

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[19] See *Williams* v. *Kaiser*, 323 U.S. 471 (1945); *Tompkins* v. *Missouri*, 323 U.S. 485 (1945); *House* v. *Mayo*, 324 U.S. 42 (1945); *DeMeerleer* v. *Michigan*, 329 U.S. 663 (1947); *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *Uveges* v. *Pennsylvania*, 335 U.S. 437 (1948); *Pennsylvania ex rel. Herman* v. *Claudy*, 350 U.S. 116 (1956); *Moore* v. *Michigan*, 355 U.S. 155 (1957). The need for counsel "may exist whether an accused contests a charge against him or pleads guilty." *Stonebreaker* v. *Smyth*, 187 Va. 250, 46 S.E.2d 409, 412 (1948).

in combination with the inexcusable failure to object to the illegal sentence and preserve the right of appeal resulted in a denial of adequate counsel, and Jones' detention is therefore void. The District Court's order dismissing his petition for the writ of habeas corpus must be reversed and the case remanded with directions to discharge the prisoner from custody; but the effectiveness of the release order will be stayed for 60 days from the date of this opinion, to allow the Commonwealth to retry this appellant or to apply to the Supreme Court of the United States for certiorari.

Reversed and remanded.

APPENDIX V

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 8716.

Claude O. Jones, Jr., Appellant,

versus

W. K. Cunningham, Jr., Superintendent of the Virginia State Penitentiary, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the order of the said District Court appealed from, in this cause, be, and the same is hereby, reversed with costs; and that this cause be, and the same is hereby, remanded to the United States District Court for the Eastern District of Virginia, at Richmond, with directions to discharge the prisoner (appellant here) from custody, in accordance with the opinion of the Court filed herein; but the effectiveness of the release order will be stayed for 60 days from this date to allow the Common-

wealth to retry this appellant or to apply to the Supreme Court of the United States for a writ of certiorari.

Further ordered that a certified copy of this judgment and a copy of the opinion be forthwith transmitted to the Clerk of the United States District Court for the Eastern District of Virginia. January 16, 1963.

/s/ SIMON E. SOBELOFF
Chief Judge, Fourth Circuit.